

FILED

15 MAR 13 AM 11:22

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

mp
DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

AZCO BIOTECH, INC., a Nevada
Corporation; and J. ADAMS, an
individual,

Plaintiffs,

vs.

QIAGEN, N.V., a Netherlands holding
company; et al.,

Defendants.

CASE NO. 12-CV-2599-BEN (DHB)

**ORDER DENYING PLAINTIFFS'
MOTION FOR LEAVE TO AMEND**

[Docket Nos. 74, 88]

Before this Court is a Motion for Leave to Amend the Complaint, filed by Plaintiffs Azco Biotech, Inc. and J. Adams on December 8, 2014. (Docket No. 74). On January 6, 2015, Plaintiffs filed an Amended Notice of Motion that included the date and time of hearing. (Docket No. 88). The Court considers the two documents, the Motion and the Amended Notice, as one motion. For the following reasons, the Motion is **DENIED**.

BACKGROUND

On August 24, 2012, Plaintiffs initiated this action against Defendants, alleging eighteen claims. In December 2012, Defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docket No. 10). On January 4, 2013, the Court granted Defendants' motion to dismiss in part, and particularly limited Plaintiffs' fraud claims. (Docket No. 25, Aug. 20, 2013 Order 18-19.) The

1 Court also granted Plaintiffs leave to file an amended complaint within 21 days of
2 the Order. Plaintiffs did not file an amended Complaint.

3 On December 20, 2013, the Magistrate Judge issued a scheduling order
4 pursuant to Federal Rule of Civil Procedure 16, in which a deadline to amend
5 pleadings was set for February 24, 2014. (Docket No. 44.) The Magistrate's order
6 scheduled discovery to close on August 22, 2014. At the Parties' request, the
7 discovery cut-off deadline was continued to October 22, 2014. (Docket No. 58.)

8 Plaintiffs filed the instant Motion to Amend just two days before they filed a
9 motion for partial summary judgment.

10 LEGAL STANDARD

11 Once the court issues a "pretrial scheduling order pursuant to Federal Rule of
12 Civil Procedure 16 which establishe[s] a timetable for amending pleadings," Rule
13 16 standards control. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08
14 (9th Cir. 1992). A scheduling order "may be modified only for good cause and with
15 the judge's consent." Fed. R. Civ. P. 16(b)(4). Rule 16(b)'s "good cause" standard
16 looks to the "diligence of the party seeking the amendment." *Johnson*, 975 F.2d at
17 609.

18 DISCUSSION

19 Plaintiffs desire to amend their Complaint in order to include more specific
20 factual allegations to bolster three claims that this Court previously limited:
21 promissory fraud, intentional misrepresentation, and negligent misrepresentation.
22 Plaintiffs contend that they discovered new facts throughout discovery. Forty-five
23 new paragraphs appear in the proposed amended complaint. The new paragraphs
24 allege that Defendants induced Plaintiffs to partner with them and to market and
25 distribute Defendants' products. All the while, it was Defendants' intent to be
26 acquired by a third party. During acquisition negotiations, Plaintiffs allege that
27 Defendants urged them to keep working by claiming the new parent company would
28 continue to use Plaintiffs to distribute their products even after the acquisition.

1 First, Plaintiffs argue that Federal Rule of Civil Procedure 15 contains the
2 correct standard to apply in this case. The Ninth Circuit made it clear in *Johnson*
3 that Rule 15 does not control once a scheduling order has been issued. *Johnson*,
4 975 F.2d at 608. Rule 16 controls the instant Motion. *See In re W. States*
5 *Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 736 (9th Cir. 2013) (applying
6 the “good cause” standard in Rule 16 where plaintiffs moved to amend their
7 complaints to add new claims after a scheduling order was issued).

8 Second, an amended complaint to simply add new facts is unnecessary at this
9 stage in the litigation. This action has progressed beyond a motion to dismiss.
10 Motions for summary judgment are pending. Plaintiffs have also included the
11 proposed new facts in their motion for partial summary judgment.

12 Third, Plaintiffs’ reasoning for amending their complaint is insufficient to
13 show they acted diligently. Once Defendants advised Plaintiffs of the position they
14 would take in a motion for summary judgment—that insufficient evidence had been
15 established to support Plaintiffs’ fraud claims—Plaintiffs decided to add new
16 factual allegations to their Complaint. (Mot. 2.) Plaintiffs argue amendment is
17 necessary to defend against Defendants’ position. That is not so. Plaintiffs can
18 properly contest the defense case in an opposition to Defendants’ motion for
19 summary judgment.

20 Finally, Plaintiffs comment that the “new facts” were not known to them
21 before the discovery phase. Yet, they do not point to any particular facts that were
22 learned from Defendants’ disclosures. Defendants claim that they produced
23 documents on two occasions: first in May 2014, and again in July 2014. (Opp’n 5.)
24 Some of these “new facts” are supported by public documents or emails that
25 Plaintiffs had in their possession. (Mot. 2.) Further, even if Plaintiffs could not
26 have known these facts until discovery, Plaintiffs provide no sufficient reason for
27 waiting until December 2014 to amend their Complaint.

28 The deadline to amend pleadings was February 24, 2014. Over one year has

1 passed. Defendants' last production of documents occurred in July 2014.
2 Discovery closed on October 22, 2014. Yet, Plaintiffs provide no good cause for
3 waiting until the deadline to file motions for summary judgment to attempt to
4 amend their Complaint. Nor do Plaintiffs give a reason for why an amendment is
5 necessary.

6 **CONCLUSION**

7 Upon review, the Court finds the time for amending the complaint has passed,
8 and no good cause has been shown for permitting a late amendment to the
9 Complaint. Accordingly, the Motion to Amend is **DENIED**.

10 **IT IS SO ORDERED.**

11
12 Dated: March 13, 2015


13 HON. ROGER T. BENITEZ
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28